No. 79-1380

Supreme Court, U. S.
FILED
OCT 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

v.

CHARLES EDWARD WILSON, ET AL.,

Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois

BRIEF FOR THE APPELLEES

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QUESTION PRESENTED

Whether section 1611(e)(1)(A)-(B) of the Social Security Act violates the due process clause of the Fifth Amendment by excluding from eligibility for Supplemental Security Income public assistance benefits otherwise eligible individuals between the ages of 21 and 65 who are residents of public mental institutions.*

* SUP. CT. R. 15.1.(a) provides that "[o]nly the questions set forth in the jurisdictional statement or fairly included therein will be considered by the Court." The question set forth here is the same as presented in the Secretary's Jurisdictional Statement. The Secretary's Brief, however, now sets forth quite a different question: whether section 1611(e)(1)(A)-(B) violates the due process clause by excluding from Supplemental Security Income benefits otherwise eligible residents of *all* public institutions not funded by Medicaid. This is a much more expansive question than that in the Jurisdictional Statement, is not posed by the statutory scheme, and is not a "subsidiary question fairly included" within the question in the Jurisdictional Statement. SUP. CT. R. 15.1.(a).

PARTIES TO THE PROCEEDING IN THE DISTRICT COURT

The named plaintiffs who obtained the judgment from which the Secretary appeals are Maudie Simmons and John Turney. Judgment, Jurisdictional Statement at 22a, ¶4. They are the appellees here.*

The appellant, Patricia R. Harris, Secretary of Health and Human Services, was the defendant against whom judgment was entered. She was substituted for prior Secretaries of the Department of Health, Education and Welfare, pursuant to FED.R.CIV.P. 25(d).

* When this case was first filed, there were other named plaintiffs, including Charles Wilson. These other named plaintiffs, however, did not satisfy certain jurisdictional requirements for actions under the Social Security Act and were dismissed as party plaintiffs under the judgment of the Court of Appeals. *Wilson v. Edelman*, 542 F.2d 1260 (7th Cir. 1976). On remand from that judgment the parties and the district court nonetheless continued to use Mr. Wilson's name in the caption. In her Jurisdictional Statement the Secretary continued to use Mr. Wilson's name in the caption, and appellees have done so as well.

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BRIEF FOR THE APPELLEES

STATEMENT

The Secretary's Statement adequately reviews the prior proceedings and the statutory scheme in which the question presented arises. Appellees disagree, however, with the sentence at 6-7 of the Secretary's Brief characterizing the nature and scope of the statutory "exception" and "exclusion." We address this statement in the first section of our argument.

SUMMARY OF ARGUMENT

The district court correctly held that the classification created by section 1611(e)(1) of the Social Security Act (42 U.S.C. § 1382(e)(1) (1976 & Supp. II 1978) [hereinafter cited as § 1611(e)(1)] invidiously discriminates against appellees and violates the equal protection component of the due process clause of the Fifth Amendment.

I.

Under the Supplemental Security Income (SSI) program the federal government has assumed full responsibility for meeting the cash assistance needs of indigent aged, blind and disabled persons. The regular grant for an eligible individual is $238 monthly. When an eligible individual resides in a medical institution, he normally receives, pursuant to section 1611(e)(1), a reduced SSI grant of $25 monthly for those subsistence items and personal needs that the medical institution does not provide, such as clothing, reading materials, toiletries and stationery.

Section 1611(e)(1), however, denies such benefits to appellees—persons aged 22 through 64 residing in public mental hospitals. The exclusion occurs because the SSI eligibility of an indigent aged, blind or disabled person in a public medical institution is dependent on whether or not the individual is eligible for benefits under the Medicaid program.

Under the Medicaid program the federal government reimburses the states for a portion of the costs of medical care for low-income persons. As is appropriate

in a program providing benefits on the basis of medical illness or disability, the Medicaid program covers care for persons in medical institutions generally, but does not extend coverage to persons in non-medical institutions. Persons aged 22-64 in a public or private mental hospital, however, are excluded from the Medicaid coverage otherwise given to medical institution residents.

Since, for persons residing in public medical institutions, section 1611(e)(1) incorporates into SSI the Medicaid eligibility scheme, persons aged 22-64 in public mental hospitals are the only such residents who are not eligible to receive the $25 federal grant. Under section 1611(e)(1) persons in private medical institutions are not excluded to any extent, however. Those receiving Medicaid get $25 monthly. Those not receiving Medicaid (i.e., private mental hospital patients aged 22-64) get full SSI benefits. Thus appellees, patients aged 22 to 64 in public mental hospitals, are singled out for exclusion from SSI.

Section 1611(e)(1) discriminates against appellees on the basis of their mental illness. This is so even though some mentally ill persons receive SSI, and even though appellees would be eligible for SSI because of mental disability were it not for their residence in a "mental" hospital. Neither fact alters the nature of the discrimination. *See Nyquist v. Mauclet*, 432 U.S. 1, 7-9 (1977); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 169, 172 (1972). But regardless of whether the exclusion here is viewed as discriminating against the mentally ill or as a capricious mixture using mental illness, type of institution and age as the exclusionary factors, it violates appellees' rights under the equal protection component of the due process clause of the Fifth Amendment.

II.

The exclusion of appellees from the $25 monthly personal needs grant for patients in medical institutions has no rational relationship to any legitimate governmental purpose.

A. Both parties agree that Congress did not indicate, either in the statute or its legislative history, what interests the classification here might serve. The Secretary as well fails to present any rationale for the classification. The Secretary's allusions to certain general equal protection principles, without reference to how they might justify the discrimination at issue, do not save the classification. The Secretary simply fails to explain why there is a rational line in the SSI program with indigent disabled public hospital mental patients aged 22-64 on one side, and all other indigent aged, blind or disabled residents of public or private general hospitals, mental hospitals, nursing homes, intermediate care facilities and other medical institutions on the other.

The Secretary agrees that the discrimination against appellees is not and can not be based on any judgment that their need for the monthly $25 grant is less than the need of other similarly situated residents of medical institutions. The appellees' needs, in fact, may be greater than those of residents of other medical institutions, since the grant and the opportunity it affords to purchase and own certain personal possessions combat the institutional desocialization syndrome that prolongs mental hospitalization.

B. Congress articulated specific reasons for its refusal to provide federal Medicaid matching funds to the states to subsidize the provision of medical care in mental hospitals. The reasons that justify the exclu-

sion of public and private mental hospital patients from the Medicaid program have no necessary or actual application to the denial of benefits under the SSI program to public mental hospital patients. The programs have different purposes, use different methods to distribute benefits, and, in numerous respects, have different eligibility requirements.

The Medicaid exclusion of mental hospital residents was based on a specific congressional determination that the cost of matching state expenses for medical care in mental hospitals would be very large. There was, and there could be, no comparable fiscal interest in the SSI exclusion at issue here. The cost of extending benefits to appellees is insubstantial when compared to the costs of the SSI program as a whole. Furthermore, the $25 SSI benefit to a person in a medical institution for a month is less than the federal share for Medicaid hospital costs for one patient day.

Congress determined in 1950 and 1965 that medical care in state mental hospitals was a state responsibility. In enacting the SSI program in 1972, Congress made no comparable determination that income maintenance for the aged, blind and disabled in public hospitals was also a state responsibility. Section 1611(e)(1) in fact is based on a contrary determination that such income maintenance should be a wholly federal responsibility and that this federal responsibility extends to residents of both public and private medical institutions.

The Secretary posits a line for SSI purposes between persons on whose behalf medical institutions receive partial federal Medicaid reimbursement and persons on whose behalf there is no federal Medicaid participation. The suggested line does not exist, since Medicaid reimbursement extends to mental institution care for ap-

pellees during the month in which they enter the mental hospital.

C. In measuring whether a statutory discrimination is the product of a purposeful and rational congressional scheme, the Court has looked not only for some articulation of governmental purpose, but also for an indication in the legislative history that legislators had some "recognition" or "specific knowledge" of the effect of the legislation. *Schlesinger v. Ballard*, 419 U.S. 498, 508 n.12 (1975). *See also Johnson v. Robison*, 415 U.S. 361, 381 (1974).

In this case there was no such recognition. On the contrary, Congress appears to have enacted section 1611(e)(1), which was part of a bill containing hundreds of amendments to the Social Security Act, heedless of its consequences for appellees. The legislative history not only provides no reason for the exclusion, but also essentially is silent as to its existence. The Secretary's contrary reading of the legislative history is unjustified.

The denial of SSI benefits to appellees can not be understood as part of the product of any rational congressional scheme. Rather, section 1611(e)(1) can best be understood as a reflection of congressional inattention to appellees and their needs. Such inattention results from the political powerlessness of the mentally ill and the societal antipathy that has been directed towards them, and offers the most reasonable explanation of how the invidious and irrational discrimination against appellees came about.

III.

If the Court determines that the exclusion of appellees bears a rational relationship to some legitimate govern-

mental purpose, it then becomes necessary in this case to test the exclusion under more stringent standards. Section 1611(e)(1) creates a classification that discriminates against the mentally ill and must be subjected to a heightened standard of judicial review. The classification cannot meet this test.

The mentally ill meet the criteria this Court has identified as requiring heightened judicial scrutiny of classifications affecting certain minorities. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973), and *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). The mentally ill have been saddled with disabilities, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness. They constitute a discrete and insular minority which has been and is subjected to social prejudice and stigma. *See Vitek v. Jones*, 100 S.Ct. 1254 (1980). Mental illness also is usually a condition over which the individual has no control.

The Secretary asserts that any heightened scrutiny of the statutory exclusion here is inappropriate because mental illness relates to a person's ability to participate in or contribute to society. That assertion is itself in part a reflection of the inappropriate stereotyping of the mentally ill. Any such relationship is far more attenuated than the Secretary suggests. In any event, the groups to which this Court has given special protection have not always met all of the variously articulated criteria for triggering special scrutiny. The mentally ill are sufficiently like such groups to which special judicial protection has been extended that application of a heightened scrutiny standard to the exclusion here is appropriate.

ARGUMENT

I.

THE HISTORY AND NATURE OF THE EXCLUSION OF APPELLEES FROM SUPPLEMENTAL SECURITY INCOME ELIGIBILITY.

A. Introduction

Supplemental Security Income ("SSI") is a comprehensive federal income maintenance program for indigent aged persons and indigent blind and disabled persons under age 65. Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1385 (1976 & Supp. II 1978). The Department of Health and Human Services makes payments directly to eligible persons. The standard payment is $238 monthly. When an eligible person is in a public or private medical institution for a full month, the payment level is reduced to $25 monthly. 42 U.S.C. § 1382(e)(1) (1976 & Supp. II 1978) [hereinafter cited as section 1611(e)(1) of the Social Security Act]. Appellees, aged 22-64 and patients in public mental hospitals, are excluded from any benefits, however.

The Secretary states that this exclusion results from "the interaction of two complex statutory schemes"—Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396k (1976 & Supp. II 1978) ("Medicaid"), and the Supplemental Security Income statute. Secretary's Brief at 14. "[A]ppellees are excluded from SSI by virtue of the incorporation of the Medicaid eligibility scheme into section 1611(e) [the SSI eligibility provision]. . . ." *Id.* at 22.

While the Secretary's summary description of the issue is sound, her fuller characterization of the interaction between Medicaid and SSI is not. Inaccurate in par-

ticular is the Secretary's statement that the SSI statute: (a) contains a "blanket exclusion" of residents of public institutions, tempered by a "limited exception" of eligibility for some medical institution patients (Brief at 6-7); and (b) does not discriminate against mental patients.

The language of the statutes and their history, reviewed below, demonstrate instead that Congress has: (a) incorporated into the SSI program the differentiation made by the Medicaid program between *medical* institution patients, who are included, and residents of public *non-medical* institutions (such as prisons), who are excluded; but (b) singled out mentally ill persons, from the universe of persons in medical institutions, for disparate exclusionary treatment.[1]

B. The History Of The Medical Assistance Provisions Incorporated Into Section 1611(e)(1)

The legislative distinctions between medical and non-medical institution residents, and between mentally ill persons and other medical institution residents, originated in the 1950 amendments to the Social Security Act. Prior to 1950 Congress had not provided for coverage of medical care for the categories of needy persons eligible for the Social Security Act's public

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[1] The statutory exclusion from SSI benefits also applies to needy persons under age 65 residing in public tuberculosis hospitals. *See* 42 U.S.C. §§ 1382(e)(1), 1396d(a)(17)(B) (1976 & Supp. II 1978). This exclusion, which is not at issue, affects a very small number of persons and will not be further discussed. In 1976 there were at any one time only 2,000 residents of tuberculosis hospitals. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1978, at 108 (1978). The number of such residents—many of whom would be unaffected by the exclusion in any event (*e.g.*, because not needy, or over age 64, or in private tuberculosis hospitals)—had been dropping rapidly before 1976, *id.* at 109, and is likely to be even lower today.

assistance programs. The categories of persons included in the programs before 1950 were the aged, the blind, and dependent children. In 1950 Congress added disabled adults to the categories of persons eligible for assistance. Social Security Act Amendments of 1950, Pub. L. No. 81-734, ch. 809, § 351, 64 Stat. 557 (1950) (codified at 42 U.S.C. §§ 1351-1355 (1976 & Supp. II 1978)). In addition, Congress created a medical assistance program for all the categories of needy persons.

Under the medical assistance program Congress provided federal matching funds to the states to make vendor payments to public and private hospitals, nursing homes and other medical providers for "medical care . . . or any type of remedial care recognized under State law," Pub. L. No. 81-734, ch. 809, § 351, 64 Stat. 557. "Medical care" consisted of "medical services provided by any person authorized by State law to render such services." H.R. REP. NO. 1300, 81st Cong., 2d Sess. 42 (1949) [hereinafter cited as H.R. REP. NO. 1300].

The 1950 amendments contained two significant exceptions to the general coverage the medical care program offered. First, while care in medical institutions was generally included, care for residents of public non-medical institutions (*e.g.*, prisons and other correctional facilities) was excluded. "Medical care and remedial care" were defined to exclude "care in behalf of any individual who is an inmate of a public institution (except as a patient in a medical institution)." Pub. L. No. 81-734, ch. 809, §§ 303(a), 343(a), 351, 64 Stat. 549, 554, 557. Second, persons receiving treatment for mental illness were excluded from the otherwise potentially comprehensive coverage of medical institutions. Congress excluded not only a "patient in an institution for

. . . mental diseases" (Secretary's Brief at 28), but also any aged, blind or disabled person "who has been *diagnosed* as having tuberculosis or psychosis and *is a patient in a medical institution as a result* thereof." Pub. L. No. 81-734, ch. 809, §§ 303(a), 343(a), 351, 64 Stat. 549, 554, 557 (aged), (blind), (disabled) (emphasis added).[2]

The two central distinctions made in 1950 have not been eliminated by subsequent amendments to the medical assistance provisions of the Social Security Act, including the 1965 enactment of Medicaid. Social Security Amendments of 1965, Pub. L. No. 89-97, § 121, 79 Stat. 286 (codified at 42 U.S.C. §§ 1396-1396k (1976 & Supp. II 1978)). The Medicaid program specifically authorizes coverage of certain medical institutional care (*e.g.*, hospitals and nursing homes, *see* 42 U.S.C. §§ 1396d(a)(1), (4) (1976 & Supp. II 1978)). A residual clause authorizes coverage of "any other medical care, and any other type of remedial care recognized under State law. . . ." 42 U.S.C. § 1396d(a)(17) (1976 & Supp.

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[2] Senator Long later described the statute as providing that when a person was in a medical institution for any reason, "the minute it appeared that that person is mentally ill Federal aid is to be cut off." *Public Assistance Act of 1962: Hearings on H.R. 10606 Before the Senate Comm. on Finance*, 87th Cong., 2d Sess. 357 (1962). In this sense most mentally ill persons were for all practical purposes excluded from medical assistance, since there is a high correlation between the status of being treated in a medical institution for disabling mental illness and the status of being deemed mentally ill: a person usually is not labeled as mentally ill until he or she enters a medical institution for treatment of the condition. (The label continues to apply, but is tempered, after the person leaves the institution.) Johannsen, *Attitudes Toward Mental Patients: A Review of Empirical Research*, 53 MENTAL HYGIENE 218 (1969); Rabkin, *Public Attitudes Toward Mental Illness: A Review of the Literature*, SCHIZOPHRENIA BULLETIN 9, 16, 23 (1974) [hereinafter cited as *Public Attitudes*].

II 1978). That clause, however, then provides, as did the 1950 amendments, that care in medical institutions is covered but care in non-medical public institutions is not: medical care does not include "care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution)". 42 U.S.C. § 1396d(a)(17)(A) (1976 & Supp. II 1978).

The second distinction, the different eligibility status of mentally ill patients in medical institutions, also has been preserved, although the exclusion has been narrowed. Since Medicaid was enacted in 1965, federal matching funds have extended to treatment, without durational limit, for mental illness in public or private general hospitals. 42 U.S.C. § 1396d(a)(1) (1976 & Supp. II 1978). Congress accomplished this change by eliminating that portion of the prior exclusion based on a diagnosis of mental illness and residence in any medical institution. *See* S. REP. NO. 404, 89th Cong., 1st Sess. 20 (1965), *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 1943, 2084 [hereinafter cited as S. REP. NO. 404].[3] Since 1965 Congress also has covered under Medicaid the aged mentally ill in public or private psychiatric hospitals. 42 U.S.C. § 1396d(a)(14) (1976 & Supp. II 1978).

Congress, however, continued in 1965 to exclude from coverage those mentally ill persons (other than the aged) confined in public or private psychiatric hospitals: "such term [medical assistance] does not include— . . . (B) any

[3] In 1960 Congress had modified the exclusion of care for mental illness in general (non-psychiatric) hospitals by amending section 6 of the Act, 42 U.S.C. § 306, so that the denial of federal funds for care for an aged individual "diagnosed" as mentally ill and "in a medical institution as a result thereof" did not apply for the first 42 days. Pub. L. No. 86-778, § 601(f)(2), 74 Stat. 991.

such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for . . . mental diseases." 42 U.S.C. § 1396d(a)(17)(B) (1976 & Supp. II 1978). Congress has maintained this exclusion, except with respect to children up to age 22 in public or private psychiatric hospitals. Pub. L. No. 92-603, § 299B, 86 Stat. 1460-61, 42 U.S.C. § 1396d(a)(16) (1976). Persons aged 22-64 in public or private mental hospitals do not receive Medicaid.[4]

C. The SSI Program

Congress established the SSI program in 1972 to provide federal cash welfare benefits to "[e]very aged, blind, or disabled individual who is determined under [42 U.S.C. §§ 1382-1382e] to be eligible on the basis of his income and resources." 42 U.S.C. § 1381a (1976). Disability can be based on either "physical or mental impairment. . . ." 42 U.S.C. § 1382c(a)(3)(A) (1976).

SSI is a comprehensive program with a federal definition of eligibility and direct federal payments to eligible persons. It is "a single uniform system of welfare benefits." Secretary's Brief at 6. *See* 42 U.S.C. § 1381 (1976); S. REP. NO. 1230, 92d Cong., 2d Sess. 75 (1972) [hereinafter cited as S. REP. NO. 1230]; 117 CONG. REC. 21350 (1971) ("The Federal government will take over full responsibility from the States for [income maintenance for] the aged, blind and disabled. If they choose,

[4] They do receive Medicaid, however, for their medical institution costs for the calendar month in which they enter a mental hospital. *See* p. 31 *infra*.

the individual States may supplement the above.") (remarks of Rep. Lloyd).[5]

The regular monthly SSI payment to a non-institutionalized individual is currently $238. SOCIAL SECURITY ADMINISTRATION, SSI CLAIMS MANUAL § 13127 (1980). Section 1611(e)(1), however, creates different payment rules for institutionalized persons, providing a $25 monthly SSI grant for the residents of medical institutions, except appellees.

Section 1611(e)(1) provides:

> (A) Except as provided in subparagraph (B) and (C), no person shall be an eligible individual or eligible spouse for purposes of this subchapter with respect to any month if throughout such month he is an inmate of a public institution.
>
> (B) In any case where an eligible individual or his eligible spouse (if any) is, throughout any month, in a hospital, extended care facility, nursing home, or intermediate care facility receiving payments (with respect to such individual or spouse) under a State plan approved under subchapter XIX of this chapter [Medicaid], the benefit

[5] The "supplement" Rep. Lloyd referred to provides for states to pay additional, 100% state-funded benefits to persons receiving the 100% federal SSI grant. *See, e.g.*, 42 U.S.C. § 1382e (1976 & Supp. II 1978). Such state supplementary grants to persons receiving SSI formed the only context in which Congress intended that state cash assistance obligations to the indigent aged, blind and disabled would continue. The suggestion (Secretary's Brief at 31) that Congress otherwise left to the states any responsibility for income maintenance for the indigent aged, blind and disabled is without support. *See also* 117 CONG. REC. 21385 (1971) (remarks of Rep. Minish); 118 CONG. REC. 32903-904 (1972) (remarks of Sen. Long); *id.* at 36805 (remarks of Sen. Long); *id.* at 36917 (remarks of Rep. Mills). The contrary dictum on this point in *Baur v. Mathews*, 578 F.2d 228, 233 (9th Cir. 1978) (*see* Secretary's Brief at 31) is simply wrong, and has no basis in the legislative history.

> under this subchapter for such individual for such month shall be payable (i) at a rate not in excess of $300 per year [$25/month] . . . .

The $25 grant is for small personal needs and subsistence items not provided by the medical institution. The Senate Report says:

> People who are residents of certain public institutions, or hospitals or nursing homes which are getting Medicaid funds, would get benefits of up to $25 a month (reduced by nonexcluded income). For these people most subsistence needs are met by the institution and full benefits are not needed. Some payment to these people, though, would be needed to enable them to purchase small comfort items not supplied by the institution. No supplemental security benefits will be paid to an individual in a penal institution. S. REP. NO. 1230, *supra*, at 386.

See also H.R. REP. NO. 231, 92d Cong., 1st Sess. 150 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4989, 5136 [hereinafter cited as H.R. REP. NO. 231]. With the exception of those persons whom section 1611(e)(1) excludes from benefits, all indigent aged, blind or disabled legal residents of the fifty states and the District of Columbia are eligible for the federal SSI grants, unless they leave the United States or refuse to comply with administrative cooperation requirements. 42 U.S.C. §§ 1381a, 1382 (1976).

D. The SSI Statute Discriminates Against Mentally Ill Persons.

Subsection (A) of section 1611(e)(1) makes ineligible for SSI benefits an "inmate of a public institution," except as otherwise provided in subsections (B) and (C). Subsection (B) undoes the exclusion for residents of all public medical institutions on whose behalf the institution receives Title XIX (Medicaid) payments. All such

persons are eligible for a $25 monthly SSI payment. Since Medicaid excludes persons aged 22-64 in mental hospitals and includes all other medical institution residents, the latter are reincluded and made eligible for SSI by subsection (B). The replication of the Medicaid eligibility scheme by the SSI program is not, however, complete. Persons aged 22 through 64 and residing in *private* mental hospitals (and ineligible for Medicaid) neither are excluded by section 1611(e)(1)(A) nor fall under the reduced benefit ($25 per month) provision of section 1611(e)(1)(B) for Medicaid recipients; they receive full SSI benefits.

Section 1611(e)(1) thus makes eligible for SSI benefits: residents of public or private general hospitals (including residents being treated for mental illness); residents of public or private intermediate care or skilled nursing care facilities (including institutions for the mentally retarded); residents (aged under 22 or over 64) of public or private mental hospitals; and residents of *any* public or private "medical institution." The exception is appellees—those residents aged 22-64 in a public mental hospital. 42 U.S.C. § 1382(e)(1); 42 U.S.C. §§ 1396d(a)(1), (4), (14), (15), (16), (17), 1396d(d), (h) (1976 & Supp. II, 1978).

The Secretary characterizes the exclusion/reinclusion scheme as a "blanket exclusion" of public institution residents with a "limited exception" for residents of Medicaid institutions. Secretary's Brief at 6-7. That description is faulty because it ignores the substance of the incorporation that section 1611(e)(1) effects.

The substance of what is incorporated by section 1611(e)(1) is Congress' exclusion of residents of public *non-medical* institutions from coverage under the Social Security Act's medical assistance provisions, and its in-

clusion of residents of public and private *medical* institutions (except for the mentally ill appellees). The classes thus included for and excluded from SSI benefits are not defined by their respective sizes (as suggested by the Secretary's reference to a "blanket exclusion" and "limited exception"), or by a public/private institution dichotomy. Rather, section 1611(e)(1) defines SSI eligibility primarily by reference to the same distinctions that define Medicaid eligibility. The first is residence in a medical (as opposed to non-medical) institution—a distinction having validity in programs that are designed to provide benefits for those who are medically disabled and that seek to alleviate or remove such disabilities where possible. The second distinction excludes certain mentally ill residents of medical institutions, while all other similarly situated residents of public or private medical institutions are included. This latter distinction is valid in the Medicaid program, but is not rationally related to any legitimate governmental purpose in the SSI program. *See* pp. 19-32 *infra*.

The Secretary says that section 1611(e)(1) is "facially neutral" regarding "mental health" (Brief at 22). She describes the exclusion of appellees from SSI benefits as "based not on mental health but rather on the patient's age and the type of public institution in which he is receiving treatment." Secretary's Brief at 20. These statements also represent a refusal to examine the substance of the statute.

Such an examination shows that section 1611(e)(1)(B)'s reinclusion of residents of Medicaid-funded medical institutions replicates the distinction created by the Medicaid statute between medical institution residents in general and the class of mentally ill patients specifically. The Medicaid exclusion by statutory definition re-

lates to "mental" hospital patients, 42 U.S.C. § 1396d(a)(17)(B), and it is thus public *mental* hospital residents aged 22-64 who are excluded from SSI. Since those same persons, aged 22-64, in public *non-mental* hospitals or medical facilities do receive benefits, the crucial identifying factor in the definition is the adjective "mental." A statute that excluded from a public benefit program 22-64 year old residents of public medical institutions for women, while including, *inter alia*, 22-64 year old residents of public medical institutions for men would be identified as creating a gender-based discrimination. *See Craig v. Boren*, 429 U.S. 190 (1976); *Stanton v. Stanton*, 421 U.S. 7 (1975).

Moreover, the origin of the incorporated exclusion reveals it as based on diagnosis of mental illness. *See* pp. 10-11 *supra*. Neither the subsequent narrowing of the exclusion nor the inclusion of some mentally disabled persons in the SSI program alters the nature of the discrimination. *See Nyguist v. Mauclet*, 432 U.S. 1, 7-9 (1977); *Califano v. Goldfarb*, 430 U.S. 199, 216 (1977); *Mathews v. Lucas*, 427 U.S. 495, 504-505 n.11 (1976); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 169, 172 (1972). Nor does appellees' eligibility for SSI "in the first place" because of their mental disabilities constitute either a "tautology" or an inconsistency altering the nature of the discrimination. Secretary's Brief at 20 n.13. *See also id.* at 19. When a statute creates "eligibility" that is actually illusory because it is retracted elsewhere, the denial of eligibility is no less complete and no less invidious. *See United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd mem.*, 409 U.S. 1069 (1972).

In any event, regardless of whether the exclusion here is viewed as discriminating against the mentally ill, or as using a capricious mixture of mental illness, type of institution and age as the exclusionary factors, it violates appellees' rights under the equal protection component of the due process clause of the Fifth Amendment, since it is not rationally related to any legitimate governmental interest.[6]

II.

THE EXCLUSION OF APPELLEES FROM THE $25 MONTHLY GRANT FOR THE PERSONAL NEEDS OF INDIVIDUALS IN MEDICAL INSTITUTIONS IS NOT RATIONALLY RELATED TO ANY LEGITIMATE GOVERNMENTAL INTEREST AND THEREFORE VIOLATES THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. The Exclusion Of Appellees Is Unrelated To Any Governmental Interest In The SSI Program.

The minimum equal protection standard this Court has applied requires that a challenged classification bear a rational relationship to a legitimate governmental interest. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). In applying that standard the

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[6] Even if the legislation is properly viewed as discriminating against the mentally ill *qua* mentally ill, it is still appropriate to examine it first under the "rational basis" test, rather than some form of heightened scrutiny, where, as here, the statutory classification is unrelated to any governmental interest, and the "rational basis" test is adequate to invalidate the exclusion. *See James v. Strange*, 407 U.S. 128, 134, 140 (1972); *Jackson v. Indiana*, 406 U.S. 715, 737, 739 (1972); *Rinaldi v. Yeager*, 384 U.S. 305, 307-308 (1966). The rational basis test also was used in the first cases involving gender discrimination, which was later subjected to heightened scrutiny. *Compare Reed v. Reed*, 404 U.S. 71 (1971) *with Wengler v. Druggists Mutual Ins. Co.*, 100 S. Ct. 1540 (1980).

Court normally has looked first to those governmental interests, if any, that the legislature has articulated or that are related to the purposes of the statute creating the classification. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1976); *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

Congress itself did not indicate in the SSI statute, committee reports or debates any interests or objectives that the classification at issue here might serve. The Secretary concedes this point when she states that "Congress did not articulate any particular rationale for the classification . . . ." Secretary's Brief at 33.

The Secretary also fails to present any rationale related to the purposes of the SSI statute. Under the SSI program Congress assumed full responsibility for income maintenance for indigent aged, blind and disabled persons, including those persons in medical institutions. The exclusion of appellees is unrelated to the purposes of SSI, particularly since appellees' need for the benefits is the same as, if not greater than the needs of other aged, blind and disabled persons. *See* pp. 22-23 *infra*.

Since the exclusion has no basis that is related to the purposes of the SSI program, the Secretary attempts to support her position by citing general authority for the propositions that legislative classifications must be given deference, and that legislatures must be given great latitude in drawing necessary statutory lines. Secretary's Brief at 17-18, 30, 32. The deference due most legislative classifications, however, does not immunize from judicial review those classifications that are unrelated to any legitimate governmental purpose. *See, e.g., Mathews v. DeCastro*, 429 U.S. 181, 185 (1976) (such review "not toothless"); *James v. Strange*, 407 U.S. 128 (1972).

Nor does the mere existence of a "line" that creates a classification make the classification rational simply by reference to the general rubric of "line-drawing." The congressional need to draw some lines defining the particular problems it was addressing does not justify the arbitrary character of the exclusion of appellees. Such necessary lines[7] exist in the SSI statute; they shape the limits of the program by, *e.g.*, the definition of disability for persons under 65, the definition of eligibility in terms of income and resources, and the general differentiation, incorporated from Medicaid, between medical and non-medical institutions. Appellees—indigent, disabled residents of medical institutions—fall within the contours of the program shaped by all these lines; appellees "thus satisfy the general eligibility requirements under the SSI program." Secretary's Brief at 7.

The invidious discrimination against appellees results from an irregular and arbitrary concavity in the shape of the SSI program, rather than from a line necessitated by the nature and purposes of the program. *See Jimenez v. Weinberger*, 417 U.S. 628 (1974); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). The Secretary simply fails to explain why there is a necessary or rational line in the SSI program with indigent disabled public mental hospital patients aged 22-64 on one side, and all other indigent aged, blind or disabled patients in medical institutions on the other. This rococo design may bear a resemblance to the 28-

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[7] *See, e.g., Weinberger v. Salfi*, 422 U.S. 749 (1975) (line establishing minimum duration of relationship, to avoid granting benefits based on sham marriage); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (lines establishing qualifications for professional licensing).

sided map in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), but it resembles no line this Court has ever sanctioned as necessary line-drawing.

The Secretary also relies (Brief at 13) on the principle that the legislature may "take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955), and that it can "concentrate limited funds where the need is likely to be greatest," *Califano v. Boles*, 443 U.S. 282, 296 (1979). Given the contours and breadth of the SSI statute, and the narrow exclusion of the particular class of appellees for reasons unrelated to the legislative purpose or the primary definitions of eligibility, the concept of incrementalism sanctioned by *Williamson* is irrelevant.

Nor is there any indication that Congress, in making the distinction at issue, was or could have been concentrating funds where needed or differentiating on the basis of the acuteness of the problems it was addressing. The legislative history is silent, and the Secretary concedes that there is no conceivable difference with regard to need for SSI between appellees and other residents of medical institutions. "[T]he statutory classification does not exclude [appellees] because they were thought to be less needy." Secretary's Brief at 32.[8]

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[8] The Secretary had earlier conceded this proposition in her brief in *Watkins v. Califano*, No. 78-334 (E.D. Pa., filed March 1, 1979), an identical challenge to the exclusion of mentally ill persons by section 1611(e): "It is undoubtedly true that although plaintiffs lack Medicaid eligibility, they have personal needs which are similar, if not identical, to those of institutionalized individuals who are covered by Medicaid [and therefore receive SSI benefits]." Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 7.

Where the legislature actually has made a judgment about differing needs, even though an imprecise one, this Court normally has deferred to that judgment. *See, e.g., Califano v. Aznavorian*, 439 U.S. 170, 178 (1978) ("The needs to which this [the SSI] program responds might vary dramatically in foreign countries."). Here, however, the financial need of appellees is conceded to be the same as that of others who do receive the $25 per month grant. Appellees' needs may in fact be greater than those of most other eligible residents of medical institutions. Many commentators have described the desocialization process experienced by institutionalized individuals, a process that exacerbates mental disability and prolongs mental hospitalization. Both the deprivation of personal possessions (personal clothing to wear inside and outside the hospital, writing paper, combs and hairbrushes, toiletries and cosmetic supplies), and the absence of even small monetary transactions significantly reinforce this syndrome.[9]

In analogous circumstances where excluded and included institutionalized persons have been identically situated with respect to the purposes of the statute at

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[9] E. GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 19-20 (1961); Benson & Hansell, *Interrupting Long-Term Patienthood: A Cohort Study*, 24 ARCHIVES GENERAL PSYCH. 238 (1971); Cushing & Morgan, *The Personal Possessions of Long-Stay Patients in Mental Hospitals*, 1 SOC. PSYCH. 151, 153, 156-57 (1966) (describing the items listed in the text as "equipment which most people would regard as the minimum essential for a civilized life. . . ."); Ritchey, *Activity Groups Help Long-Term Patients Solve Everyday Problems*, 22 HOSPITAL & COMMUNITY PSYCH. 335-36 (1971); Williams, *Money and the Therapeutic Process*, 18 CANADA'S MENTAL HEALTH 20 (1970); Wolfensberger, *The Principle of Normalization and Its Implications to Psychiatric Services*, 127 AM. J. PSYCH. 291, 295 (1970).

issue, this Court has applied "rational basis" equal protection principles to invalidate comparable discrimination. *See Jackson v. Indiana*, 406 U.S. 715 (1972), and *Baxstrom v. Herold*, 383 U.S. 107 (1966) (more lax commitment procedures and more stringent release standards applied to one group of alleged mentally disabled persons violated equal protection). *See also O'Brien v. Skinner*, 414 U.S. 524, 529-30 (1974) (denial of vote to some pre-trial detainees, but not to others similarly situated, violated equal protection); *Delafose v. Manson*, 385 F.Supp. 1115 (D. Conn. 1974) (denial of equal protection to grant small "hospital pay" to prisoners hospitalized for physical ailments but to deny it to prisoners hospitalized for mental problems)[10]; *Vecchione v. Wohlgemuth*, 377 F.Supp. 1361 (E.D. Pa. 1974), *aff'd*, 558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977) (distinctions in state procedures for seizing mental patients' assets and applying them to the cost of treatment denied equal protection when the procedures varied based on the amounts of assets and competent patients had no opportunity for a hearing). The exclusion of appellees, like the classifications above, is not rationally related to any governmental interest in the program in which it occurs.

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[10] The analogy for equal protection purposes between this case and such cases as *Jackson*, *Baxstrom*, *O'Brien* and *Delafose* is not meant to suggest that relief in this case extends to persons in mental hospitals who are in correctional department custody. Mentally ill persons placed in mental hospitals by a correctional department remain ineligible for SSI so long as they are under the jurisdiction of the correctional department. *See* SOCIAL SECURITY ADMINISTRATION, SSI CLAIMS MANUAL § 12214 (1980).

B. There Is No Legitimate Governmental Interest Served By Incorporating Into The SSI Program The Medicaid Program's Exclusion Of Appellees.

The closest the Secretary comes to asserting a governmental interest in the exclusion of appellees is her statement that "Congress simply drew the line in providing SSI payments to residents of public institutions at those for whom the federal government has already assumed partial financial responsibility [through Medicaid], while leaving to the states and local governments the duty of providing for the needs of" appellees. Secretary's Brief at 30. *See also id.* at 27-28. Elsewhere she says that the "sole question" here is "whether it was constitutionally permissible . . . to incorporate the same distinction upheld in *Legion* [*v. Richardson*, 354 F.Supp. 456 (S.D. N.Y.), *aff'd mem., sub nom. Legion v. Weinberger*, 414 U.S. 1058 (1973)] when it enacted the SSI program." Secretary's Brief at 17.

Each of these formulations mischaracterizes the incorporated Medicaid eligibility scheme that serves to exclude appellees from SSI. *See* pp. 30-31 *infra*. Each formulation utilizes the mischaracterization to make the same argument: appellees may be constitutionally excluded from SSI benefits because they have been—or for the same reasons that they have been—constitutionally excluded from Medicaid benefits.

This argument, unembellished by any rationale for the linkage between the two programs, is one of constitutional conclusion, not justification. It contains no assertion of legislative purpose at all, but only one of plenary congressional power to "piggyback" governmental action in one program onto governmental action in another, without any showing that the purposes or nature of the programs justify such treatment. The argument reduces to an assertion that Congress "drew

the line" at those to whom it gave benefits and withheld SSI from those to whom it gave no benefits.

Congress' good and constitutionally sufficient reasons, expressed in 1950 and 1965, for refusing to reimburse the states for costs of medical treatment of public and private mental hospital patients have no necessary application to the exclusion of appellee public mental hospital patients from the comprehensive income maintenance program enacted in 1972 to meet personal, non-medical needs. The rationality of the SSI exclusion cannot be measured by the purposes of the Medicaid program, but rather must be evaluated in the context of the SSI program. *See United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973) (valid dependency provisions in the Internal Revenue Code were incorporated into a provision of the Food Stamp Act; the food stamp provision was unconstitutional because it was unrelated to the congressionally defined purposes of the Food Stamp Program); *Mathews v. Lucas*, 427 U.S. 495 (1976) and *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (state laws regarding inheritance rights of illegitimate children were incorporated into Title II of the Social Security Act in determining public benefit rights; the Social Security provisions were not insulated from equal protection scrutiny); *Medora v. Colautti*, 602 F.2d 1149, 1153 (3d Cir. 1979) (different welfare programs, to meet rational relationship test, "must independently assess need. . . ."); *Williams v. Wohlgemuth*, 366 F.Supp. 541, 548 (W.D. Pa. 1973), *aff'd mem.*, 416 U.S. 901 (1974) (equal protection denied in a general assistance program that distinguished between two groups of unemancipated minors and excluded one from benefits; the state's defense based on an ancillary child welfare services program which met different needs was rejected: "the gears of these two programs do

not mesh [and] they serve two different purposes."). *See also Koe v. Califano*, 573 F.2d 761 (2d Cir. 1978) (dictum).[11]

The reasons that constitutionally justify the exclusion of appellees from Medicaid do not in fact justify the denial of SSI benefits. In excluding public and private mental hospital patients from Medicaid, Congress acted on the basis of its reasonable and expressly articulated reluctance to subsidize the states in funding the extremely expensive institutional costs of medical care in certain institutions treating mental patients, and its determination that the provision of such medical care was a state responsibility. *See Legion v. Richardson*, 354 F.Supp. at 459; Secretary's Brief at 29-30. When these

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[11] In *Koe*, aged public mental hospital patients were threatened with loss of both Medicaid and SSI benefits because the hospital in which they resided faced loss of its accreditation. They sued to enjoin the threatened SSI termination; the Medicaid exclusion was not challenged. The Second Circuit did not reach the merits of their claim, but nevertheless stated:

> Plaintiffs' counsel points out that a monthly stipend of twenty-five dollars, while inconsequential to most, assumes a very different light in the eyes of an involuntarily institutionalized mental patient with no other source of income. The hospital provides food and shelter, but for plaintiffs and their counterparts it is only the [$25 monthly] SSI payments that make possible the purchase of personal items essential to any human existence transcending bare subsistence. The loss of such payments imposes a readily understandable burden; less obvious but perhaps no less significant are the uncertainty and feelings of rejection inflicted . . . on those who have so little and are mentally ill. *Id.* at 763 n.5.

The Second Circuit saw no analogy to the Medicaid exclusion, even though it recognized, *id.* at 763 n.2, that it had upheld that exclusion (for patients 22 through 64 in mental hospitals) just eight months previously in *Woe v. Mathews*, 408 F.Supp. 419 (E.D. N.Y. 1976), *aff'd mem., sub nom. Woe v. Weinberger*, 562 F.2d 40 (2d Cir. 1977), *cert. denied*, 434 U.S. 1048 (1978).

justifications are evaluated in terms of the purposes of the SSI program, and Congress' findings with respect to it, they provide no rational basis for the incorporation that denies appellees the $25 monthly grant.

The Medicaid exclusion was based in part on the large potential cost of subsidizing the states' provision of medical care in psychiatric hospitals. There is no suggestion in the legislative history that Congress considered the provision of the $25 monthly benefit to appellees to be too expensive for the federal government to fund. The cost of providing such aid is insubstantial in the context of the SSI program. *See* Motion to Affirm at 18-19. Moreover, the *monthly* SSI benefit for a person in a medical institution is less than the federal share for Medicaid mental hospital costs for each patient *day*.[12]

Nor can the SSI exclusion be defended because Congress in 1950 and 1965 considered "medical care" or "treatment" in mental hospitals to be a state respon-

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[12] In 1976 the average daily per patient hospital expense in psychiatric hospitals was $49.61. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1978, at 109 (1978). The figure presumably is higher today. The federal share of such cost is a minimum of 50%. 42 U.S.C. § 1396d(b) (1976). The Secretary appears no longer to press a fiscal argument. Having reduced her estimate of the maximum conceivable cost of providing SSI to appellees from $95 million (Jurisdictional Statement at 7 n.8) to $30 million (Reply Memorandum for Appellant at 3), she makes no reference to any figure in her brief. And her lower estimate of $30 million itself incorrectly assumes that all such persons in mental hospitals would receive benefits as the result of an affirmance. For the majority of patients this is not true. Since the median length of stay in mental hospitals is 41 days, *see Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1198 n.17 (1974), many patients are not hospitalized for a full calendar month and thus continue to receive benefits under § 1611(e)(1). Of the remainder, many are not needy or otherwise are not excluded by § 1611(e)(1). *See* Motion to Affirm at 18-19.

sibility that it did not want to subsidize.[13] That congressional determination did not carry with it any companion view concerning the personal, non-medical needs of the hospital residents. Hypothetically, Congress could have excluded all persons in medical institutions from SSI benefits based on an assumption that such individuals had less need for cash assistance, or that meeting such needs for persons in any public medical institution was a responsibility already fulfilled by the states. *See Richardson v. Belcher*, 404 U.S. 78 (1971). Congress did not do so, nor did it structure the SSI program or make any finding consistent with a hypothesis that state responsibility should or did extend to income maintenance for medical institution residents. Rather, section 1611(e)(1) is explicitly based on a contrary recognition: that residents of public and private medical institutions have a significant, albeit reduced, need for federal income maintenance.

The institutions provide for "most subsistence needs," S. REP. NO. 1230, *supra*, at 386, and in particular food, shelter and medical treatment. 20 C.F.R. § 416.231(b)(1)

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[13] *See, e.g.*, H.R. REP. NO. 1300, *supra*, at 42; H.R. REP. NO. 213, 89th Cong., 1st Sess. 128 (1965); S. REP. NO. 404, *supra*, at 73, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 1943, 2084. Moreover, while Congress felt that providing such medical care had been a traditional responsibility of the states, Congress never assumed that medical care and treatment were "being fully provided" by the states. *See* Secretary's Brief at 27. Rather, Congress considered the states' provision of mental hospital care inadequate. *See generally, e.g.*, S. REP. NO. 404, *supra*, at 145-46, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 1943, 2085-86; 106 CONG. REC. 17990-18000, 18027-50 (1960) (remarks of Sens. Long, Yarborough, Ervin, Morse). *Cf.* S. REP. NO. 416, 96th Cong., 1st Sess. 19 (1979), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1936, 1949 ("In the words of one mental health expert, '100 years of bad institutional practices is long enough to wait for the State[s] to have sorted out the problems for themselves.' ").

(1980). Section 1611(e)(1), in contrast, is explicitly designed to enable residents of medical institutions to meet their remaining subsistence and personal needs—for *e.g.*, reading material, non-institutional clothing, pay phones, stationery, postage, permitted transportation, cosmetics and personal toiletries.[14] To the extent that some states ever may have provided a small grant for such needs of residents of medical institutions, Congress in section 1611(e)(1) has now assumed that responsibility.

The Secretary hypothesizes a general linkage between Medicaid and SSI to support her argument. The hypothesis of a general congruence between eligibility requirements for the two programs is incorrect. Congress did not make eligibility in the two programs congruent—logically enough, since the purposes of the programs are so different. Private mental institution residents aged 22 through 64 get SSI, even though they are not eligible for Medicaid. *See* p. 16 *supra*. Not all Medicaid recipients outside institutions receive SSI, and not all SSI recipients outside institutions receive Medicaid. *See, e.g.*, 42 U.S.C. §§ 1396a(a)(10)(C), 1396a(f) (1976). In addition, residents of Puerto Rico, in medical institutions or in the community, are eligible for

[14] Congress has differentiated the provision of money and personal possessions from institutional care and expenses in additional ways. Items charged to the personal funds of patients must be differentiated from the costs included in extended care institutional reimbursement programs. Act of Oct. 25, 1977, Pub. L. No. 95-142, § 21(b), 91 Stat. 1207; Act of June 13, 1978, Pub. L. No. 95-292, § 8(c), 92 Stat. 316. Patients must be allowed to have personal clothing and possessions except to the degree medically contraindicated. 42 C.F.R. §§ 405.1121(k)(13), 442.311(k), 442.404(k) (1979). Personal possessions include "books, pictures, games, radios, arts and crafts materials, religious articles, toiletries, jewelry, and letters." 42 C.F.R. § 442.436 (1979).

Medicaid, 42 U.S.C. § 1301 (1976 & Supp. II 1978), but not SSI. *Califano v. Torres*, 435 U.S. 1 (1978).

The Secretary hypothesizes that the exclusion of appellees reflected a congressional determination to grant aid only to those who receive "partial" or "significant" federal Medicaid support for medical institutional care. Secretary's Brief at 27-28, 30. This argument misstates the coverage of the Medicaid program. Under 42 C.F.R. §§ 435.1008(b), 436.1004(b) (1979), the Medicaid program covers mental hospital care furnished to an individual aged 22-64 during the month in which he becomes a patient in the mental hospital. *See also* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, MEDICAL ASSISTANCE MANUAL § 4-50-20G, *reprinted in* [1979] 3 MEDICARE AND MEDICAID GUIDE (CCH) ¶ 14,361.61 at 6214. Thus the "line" the Secretary posits between appellees and persons for whom the federal government has already assumed "partial financial responsibility" through Medicaid does not exist. Secretary's Brief at 30.[15]

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[15] This significant federal subsidy to mental hospitals on behalf of appellees undercuts any suggestion that the denial of SSI might serve to encourage persons to leave facilities that Congress might feel do not "meet certain minimum standards." Secretary's Brief at 28 n.20. The Secretary "do[es] not press" the suggestion for the additional reason that "some residents of public institutions may not have a choice of facilities," *e.g.*, they are involuntarily committed to such institutions. *Id.* A majority of public mental hospital residents are involuntarily committed. *See Jackson v. Indiana*, 406 U.S. 715, 737 n.22 (1972); B. ENNIS & L. SIEGEL, THE RIGHTS OF MENTAL PATIENTS 15 (1973). The categorical statutory denial

(Footnote continued on following page)

There is no rational basis for denying the $25 monthly SSI benefit to appellees because they do not receive Medicaid in months throughout which they are in an institution. The exclusion is simply an aberration that, as the classification in *James v. Strange*, 407 U.S. 128, 141-42 (1972), "embodies elements of punitiveness" and "blight[s] . . . the hopes of indigents for self-sufficiency and self-respect."

C. The Exclusion Of Appellees, Which Has No Rational Relationship To Any Legitimate Governmental Interest, Can Only Be Understood To Reflect Societal Antipathy And Resulting Congressional Inattention.

The denial of SSI to appellees bears no rational relationship to any legitimate governmental interest that the Secretary can adduce. Rather, the exclusion can be understood best as an invidiously discriminatory product of congressional inattention to appellees and their needs. That inattention in turn reflects the political powerlessness of the mentally ill and the societal antipathy that has been directed towards them.[16]

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[15] *continued*
of Medicaid (and SSI) eligibility does not, in any event, turn on the quality of the particular mental hospital. In addition, Congress hardly could have excluded appellees in order to encourage them to move to alternative types of facilities, since it has recognized that there were inadequate alternative placements. H.R. REP. NO. 248, 89th Cong., 1st Sess. 4 (1965).

[16] The differential treatment of mentally ill persons in the Social Security Act medical assistance programs incorporated by § 1611(e)(1) has been characterized as resulting from historical discrimination, historical accident, political powerlessness and antipathy. *See* 106 CONG. REC. 17990, 17998, 18027, 18039-44 (1960) (remarks of Sens. Long, Yarborough, Ervin, Morse); *Social Security Medical Care for the Aged Amendments: Hearings on H.R. 1185 Before the Senate Comm. on Finance*, 88th Cong., 2d Sess. 82 (1964) (Program exclu-

(Footnote continued on following page)

Congress is, of course, presumed to intend the results that a statute facially commands. *See United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940). In this sense Congress obviously "intended" to deny appellees the SSI benefits it extended to virtually all other residents of medical institutions. In measuring whether a statutory discrimination is the product of a purposeful and rational congressional scheme, however, this Court has looked not only for some articulation of governmental purpose, but also for an indication in the legislative history that legislators had some "recognition" or "specific knowledge" of the effect of the legislation. *Schlesinger v. Ballard*, 419 U.S. 498, 508 n.12 (1975). *See also Johnson v. Robison*, 415 U.S. 361, 381 (1974) ("quantitative and qualitative distinctions, expressly recognized by Congress. . . ."); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 191 (1979) (Rehnquist, J., concurring) ("considered product of a legislature").

In this case there is no such "recognition" or "specific knowledge." On the contrary, Congress appears to have enacted section 1611(e)(1) heedless of its consequences for appellees. The legislative history not only provides no reason for the exclusion, but also is essentially silent as to its existence.

This silence is unsurprising. Statements of legislative hostility are rare, even where, as here there is societal antipathy towards the group against whom the legisla-

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[16] *continued*
sions of mentally ill go "back to the theory that historically you didn't treat mental people; you just locked them up as criminals to separate them from society. . . .") (statement of Sen. Long); 111 CONG. REC. 15037 (1965), *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 2287 (remarks of Sen. Long).

tion discriminates. That is why the Court has referred to "infer[ring] antipathy." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Where, as here, a statute discriminates against a politically powerless group towards whom there is societal antipathy, legislative silence speaks loudly, and speculation regarding fictitious purposes is likely to obscure the reality of legislative inattention.[17]

The Secretary argues that Congress clearly understood that section 1611(e)(1) would deny benefits to appellees and therefore that the provision does not reflect congressional inattention to appellees' situation. In support of this contention she relies on: (a) the first sentence of the Senate and House Committee Reports; (b) certain 1972 Medicaid amendments; and (c) witness testimony at the Senate hearings. Secretary's Brief at 13-14, 33-35. In each case her reliance is misplaced.

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[17] Antipathy and political powerlessness are also denominators of "heightened scrutiny" in the sense the district court and the Secretary use that term. *See* Section III *infra*. The statement in *Vance*, however, that "[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process," 440 U.S. at 97, indicates that they may be factors informing rational relationship scrutiny as well. *See also Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."); *James v. Strange*, 407 U.S. 128, 141-42 (1972) (statute violating equal protection clause "embodie[d] elements of punitiveness."). The Secretary implicitly assumes that there is a single stratum of "heightened" scrutiny, rather than a continuum or range of scrutiny. These cases call that assumption into question, as do the different levels of scrutiny apparently applied to gender-based discrimination, on the one hand, and discrimination against illegitimate children on the other. *Compare Wengler v. Druggists Mutual Ins. Co.*, 100 S. Ct. 1540 (1980) *with Trimble v. Gordon*, 430 U.S. 762 (1977).

The first sentence of the House and Senate reports describing section 1611(e)(1) provides that "[p]eople who are residents of certain public institutions, or hospitals or nursing homes which are getting Medicaid funds, would get" the $25 monthly payment. S. REP. NO. 1230, *supra*, at 386; H.R. REP. NO. 231, *supra*, at 150. By italicizing the words "certain" and "which are getting Medicaid funds" in this sentence (Secretary's Brief at 13, 33), the Secretary has tried through typography rather than analysis to portray "getting Medicaid funds" as modifying "certain public institutions." Only then can she assert, as she does, that "by negative implication this language plainly betokens an intent that residents of some [*sic*; but not all?] public institutions that are not receiving Medicaid funds would not be eligible for the SSI allowance." Secretary's Brief at 34. Even if the Secretary's reading were correct, it would render the report confusing and inaccurate. It is incorrect to say that only residents of "*certain* public institutions . . . which are getting Medicaid funds," S. REP. NO. 1230, *supra*, at 386, (emphasis added) get the $25/month, since all such residents would be eligible under the Secretary's reading. The absence of a comparable statement about "certain" or "all" private institutions becomes misleading as well.[18]

The Secretary's typographical construct is, however, incorrect. The reports' use of disjunctives and punctua-

[18] The Secretary's analysis also ignores another misleading suggestion in the same sentence of the committee report: that if otherwise eligible, residents get SSI if the hospital receives any Medicaid funds, regardless of whether the Medicaid funds are received on behalf of that particular resident. The actual statutory provision ties SSI eligibility to institutional receipt of Medicaid on behalf of the particular resident. § 1611(e)(1)(B).

tion dictates that "getting Medicaid funds" modifies "hospitals or nursing homes," but does not modify "public institutions." *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979). Thus, "[p]eople who are residents of certain public institutions . . . would get" $25 monthly. This is a correct statement. It does not, however, tell a legislator which of the residents will get benefits, except possibly when read in conjunction with the exclusion in the last sentence of the relevant paragraph in the reports, which specifies that penal institution residents are ineligible. S. REP. No. 1230, *supra*, at 386; H. REP. No. 231, *supra*, at 150.[19]

There is thus no way to read the committee reports as an accurate reflection of the statutory exclusions and inclusions. Consequently there is no basis for this Court to believe that any legislator could have obtained from the reports a "recognition" or "specific knowledge" of the statutory scheme. *Schlesinger v. Ballard*, 419 U.S. 498, 508 n.12 (1975). Also, there was no discussion of section 1611(e)(1) in the floor debates, much less any discussion describing its effect upon appellees.

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[19] The report thus would be consistent with the statute if the "inmate" exclusion in § 1611(e)(1)(A) were limited to penal institution inmates. *See Levings v. Califano*, 604 F.2d 591 (8th Cir. 1979). *Contra, Baur v. Mathews*, 578 F.2d 228 (9th Cir. 1978). Because of the historical equation in the Social Security Act of "inmate" with "resident," however, appellees do not press an argument that the Secretary has misconstrued the statute. We would note, however, that the Secretary has extended SSI benefits to residents of public vocational and educational institutions (*e.g.*, a state residence for deaf children). Such residents are eligible not because they are in Medicaid institutions (they are not), but because the Secretary has categorized them as not being "inmates." 20 C.F.R. § 416.231(b)(3) (1980); SOCIAL SECURITY ADMINISTRATION, SSI CLAIMS MANUAL § 12216 (1980). This suggests that the Secretary believes the legislation and its history do not have the coherence she tries to ascribe to them, or that the Secretary considers the statutory structure irrational, or both.

The Secretary next argues that Congress understood that section 1611(e)(1) denied benefits to appellees because its passage occurred at the same time that Congress extended Medicaid eligibility to children in mental hospitals, 42 U.S.C. § 1396d(a)(16) (1976), Pub. L. No. 92-603, § 299B(a), (b), 86 Stat. 1460-61, and rejected demonstration projects to consider the feasibility of doing the same for persons aged 22-64. Secretary's Brief at 34. The Secretary's assumption—that legislators understood a link between an individual's Medicaid and SSI eligibility, either in general or by reference to the committee reports—is incorrect, as discussed above. Moreover, the provisions the Secretary cites were part of a package of several hundred amendments to several titles of the Social Security Act. In the floor debates numerous legislators noted confusion about the bill's contents because the bill's complexity and length were unsurpassed in congressional experience.[20]

Finally, the Secretary argues that Congress understood the import of the exclusion because "several" witnesses at the Senate hearings "specifically pointed out that one effect" of section 1611(e)(1) would be the denial of SSI to appellees. Secretary's Brief at 34-35. In

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[20] *See* 117 CONG. REC. 21089 (1971) (remarks of Rep. Mills); *id.* at 21383 (remarks of Rep. Podell); *id.* at 21402-403 (remarks of Rep. Randall); 118 CONG. REC. 32470 (1972) (remarks of Sen. Long); *id.* at 32477 (remarks of Sen. Bennett); *id.* at 33092-93 (remarks of Sen. Ribicoff); *id.* at 36914 (remarks of Rep. Mills) (the conference committee considered 583 differences between House and Senate versions of bill). Some legislators explicitly mentioned the impossibility of understanding the interrelationships between provisions of the bill, *id.* at 33681-82 (remarks of Sen. Chiles), or argued that since cash assistance provisions and Medicaid provisions were unrelated, they should be in separate bills, 117 CONG. REC. 21394 (1971) (remarks of Rep. Randall).

fact, there is apparently only one such statement in the thousands of pages of hearings on the massive 1972 amendments.[21] It was contained in part of one sentence in a lengthy, written section-by-section analysis of the bill inserted in the record on behalf of the New York State Department of Social Services. *Hearings on H.R. 1, supra*, at 2180. A passing reference in a single written statement submitted to a committee hearing is not helpful in determining what Congress understood. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 31 n.20 (1977). The legislative history of section 1611(e)(1) precisely parallels that considered in *Guessefeldt v. McGrath*, 342 U.S. 308, 317 (1952):

> [T]aken as a whole, the testimony on this issue was meagre and unimpressive. It was largely in written form, and therefore less likely to have been seen by or to have had impact on the committee members or to reflect their views. These considerations, taken together with the peripheral character of the problem from the committees' point of view, the consistent failure to appreciate the technical

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[21] The other witnesses cited by the Secretary as noting the exclusion of appellees from SSI in fact did not; rather they assumed that all residents of all medical institutions were eligible for SSI. *See Social Security Amendments of 1971: Hearings on H.R. 1 Before the Senate Comm. on Finance*, 92nd Cong., 1st & 2nd Sess. 3319 (1971-1972) [hereinafter cited as *Hearings on H.R. 1*] (SSI exclusion would occur "unless they are patients in a medical facility."); *id.* at 3257 (SSI exclusion affects persons in "a public institution other than medical institutions . . ."). The Secretary also suggests congressional recognition of the exclusion of appellees on the basis of a committee report issued seven years after passage of the statute. Secretary's Brief at 15 n.8. But elsewhere the same report indicates continuing confusion when it refers to comprehensive SSI coverage of residents of medical institutions: "[a] recipient's monthly SSI benefit standard is reduced to $25 for any month during all of which he is in a medical institution." H.R. REP. NO. 451, 96th Cong., 1st Sess. 55 (1979).

> significance of the term [at issue] in the framework of the Act, and the fact that the matters raised by this testimony were not touched upon in floor debate—all go far to overcome any presumption that the claimant's situation was considered by Congress and rejected.

In sum, Congress appears to have had no recognition of the effect section 1611(e)(1) would have on appellees. That inattention is the only reasonable explanation of how appellees came to be excluded from the $25 monthly SSI benefits extended to all other residents of medical institutions. The invidious discrimination simply reflects inattention to appellees and their needs, rather than the creation of a classification rationally related to any governmental interest.

III.

THE DENIAL OF SSI BENEFITS TO APPELLEES HAS NO SUBSTANTIAL RELATIONSHIP TO ANY IMPORTANT GOVERNMENTAL INTEREST AND THEREFORE VIOLATES THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

If the Court determines that the exclusion of appellees from SSI eligibility bears a rational relationship to some legitimate governmental purpose, it becomes necessary here to test the exclusion under more stringent standards. The classification discriminates against the mentally ill (*see* pp. 15-18 *supra*), and the district court correctly found that such a discrimination must be subjected to a heightened standard of review. That standard is less rigorous than the "strict" scrutiny to which racial classifications are subjected, but it requires that, to be constitutional, the legislative classification "must serve important governmental objectives and that

the discriminatory means employed must be substantially related to the achievement of those objectives." *Wengler v. Druggists Mutual Insurance Co.*, 100 S.Ct. 1540, 1545 (1980). The instant classification can not meet such a test or any other articulation of a heightened scrutiny standard. The Secretary does not argue that it can; rather, she disputes the test's applicability.

In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973), this Court identified the "traditional indicia of suspectness" as involving a disadvantaged "class . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." In the absence of these political and social disabilities, groups are assumed to be able to protect their interests in the political process, thereby justifying the deference normally given to legislative action. *See Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

Groups having such disabilities, however, need special judicial protection. There is a "narrower scope for operation of the presumption of constitutionality. . . . [when] prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities. . . ." *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). *See also Graham v. Richardson*, 403 U.S. 365, 372 (1971).

The mentally ill have all of the indicia of suspectness described in *Carolene Products* and *San Antonio Independent School District*. They historically have been subjected to purposeful unequal treatment[22]; they have been relegated to a position of political powerlessness; and prejudice against them curtails their participation in the pluralist political system and strips them of political protection against discriminatory legislation.

The institutionalized mentally ill indisputably are politically powerless. Most states disenfranchise persons who are civilly committed or "insane." *See* S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 308, 333 (1971) [hereinafter cited as BRAKEL & ROCK]. Even where some inpatients retain the right to vote, institutional restrictions limit the extent to which the patient can seek to influence the political process. In short, the "mentally ill constitute a minority segment of the polity which is often disenfranchised . . . and which is virtually powerless to improve its circumstances through the political process." *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1229-30 n.153 (1974) [hereinafter cited as *Developments—Civil Commitment*].

The Secretary suggests (Brief at 25) that friends, relatives or organized interest groups will act to protect the interests of mental patients. The stigma applied to

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[22] While earlier attitudes that attributed mental illness to demons or overtly prescribed punishment have faded, severe discrimination against the mentally ill has existed throughout history, and continues currently in a multiplicity of forms. *See* JOINT COMMISSION ON MENTAL ILLNESS AND HEALTH, ACTION FOR MENTAL HEALTH 25-28 (1961) [hereinafter cited as ACTION FOR MENTAL HEALTH]; S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 1-8 (1971); A. DEUTSCH, THE MENTALLY ILL IN AMERICA (2d ed. 1949).

mental illness, however, inhibits many relatives from making the public identification with the affected group that is necessary for legislative advocacy.[23] Moreover, since any disenfranchised group may have such a modicum of second-hand political power, the Secretary's argument simply amounts to an attack on the formulation of *Carolene Products* and its progeny. The political process from which appellees are excluded, however, envisions that equal political power and access are achieved through the franchise, not through political charity. In *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966), this Court noted that voting rights legislation enforces the equal protection clause because it "secure[s] . . . non-discriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services . . . ." *See also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (voting is the right that is "preservative of all rights"); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).[24]

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[23] *Constitutional Rights of the Mentally Ill: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. 9-10 (1961) (statement of Sen. Hruska) [hereinafter cited as *1961 Hearings on Rights of the Mentally Ill*]; *Social Security Medical Care for the Aged Amendments: Hearings on H.R. 1185 Before the Senate Comm. on Finance*, 88th Cong., 2d Sess. 83 (1964) (statement of H.E.W. Secretary Celebrezze); ACTION FOR MENTAL HEALTH, *supra*, at 71-72.

[24] Congress itself has recognized the political powerlessness of the mentally ill as a factor substantially diminishing their ability to obtain equal treatment. *1961 Hearings on Rights of the Mentally Ill*, *supra*, at 52, 171-72 (remarks of Sen. Ervin); *id.* at 231 (remarks of Sen. Keating); 111 CONG. REC. 15037 (1965) (remarks of Sen. Long), *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 2285, 2287, [reproduced in part in appellees' Motion to Affirm at 23]; *see also* S. REP. NO. 416, 96th Cong., 1st Sess. 19-20, 27 (1979), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1936, 1949-51, 1958.

The mentally ill are subject to social stigma that exacerbates their political powerlessness. This Court has noted the stigmatization inherent in civil commitment. *Vitek v. Jones*, 100 S.Ct. 1254, 1265 (1980); *Addington v. Texas*, 441 U.S. 418, 425-26 (1979). Mental hospitalization generally subjects an individual to "a stigma of inferiority and a badge of opprobrium." *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1127 (1969).[25]

While disenfranchisement alone may justify heightened scrutiny, the combination of stigma and political powerlessness certainly requires application of the *Carolene Products* principle that prejudice against a discrete and insular minority serves to strip that minority of the protection ordinarily obtained through the political processes. *See* District Court opinion, Jurisdictional Statement at 12a. Any ability of a disenfranchised, stigmatized and insular minority to participate in the pluralistic political marketplace is nullified by the unwillingness of other groups to associate with such a minority, identify common political interests, or put aside prejudice to achieve mutual political ends.[26]

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[25] The "social distance"—a sociological measure of rejection and stigma—people feel towards the mentally ill is greater than the distance felt toward the physically ill *or* ex-convicts. Tringo, *The Hierarchy of Preference Toward Disability Groups*, 4 J. SPECIAL EDUC. 295, 300, 304 (1970). *See generally Public Attitudes, supra*, at 10; *In re Ballay*, 482 F.2d 648, 668 (D.C. Cir. 1973).

[26] This problem is exacerbated where, as here, the legislation affects a group identified by stigmatizing criteria that contrast with most legislators' identity. This type of legislative "we-they" identification (white-black; citizen-alien; man-woman; legitimate birth or parenthood-illegitimate) has been common to the classifications to which this Court has applied heightened scrutiny. *See* J. ELY, DEMOCRACY AND DISTRUST 151-64 (1980).

The political and social exclusion of the mentally ill makes them a "discrete and insular minority" in need of special judicial protection. Since a central basis for presuming the constitutionality of legislation challenged under equal protection principles is the equal participation by the affected parties in a neutral political marketplace, the converse conditions make the presumption inapplicable. Heightened judicial scrutiny of the exclusion of appellees therefore is appropriate.[27]

This conclusion is not undercut by the Secretary's reference to other criteria this Court has considered in strict scrutiny analysis. The Secretary asserts that any heightened scrutiny of the exclusion of appellees is inappropriate because mental disability is not an immutable accident of birth and relates to the ability to participate in or contribute to society, citing *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) and *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). Secretary's Brief at 24. These cases suggest that classifications defined by such characteristics (*e.g.*, race, national origin) are subject to strict scrutiny. As the district court concluded here, however, they do not suggest that a group that meets all of the "traditional indicia of suspectness" articulated in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973) is not entitled to some heightened judicial protection short of strict scrutiny.

The Secretary thus errs in considering the criteria on which she relies as dispositive. The groups to which this

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[27] In addition to the cases and law review articles collected in the district court's opinion, Jurisdictional Statement at 13a-14a, *see Developments—Civil Commitment*, *supra*, at 1229-30 n.153.

Court has given special protection do not always meet all of the variously articulated criteria for triggering special scrutiny of discriminatory legislation. Women are not an insular minority. *See Frontiero*, 411 U.S. at 686 n.17. Alienage is not an "immutable characteristic determined solely by the accident of birth." *Frontiero*, 411 U.S. at 686. *See Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting). *See also Regents of the University of California v. Bakke*, 438 U.S. 265, 357-59 (Brennan, White, Marshall and Blackmun, JJ.) (1978).[28]

The factual assumptions underlying the Secretary's contention are also open to question. The district court correctly noted that the "accident of birth" criterion reflects constitutional disfavor of classifications based on characteristics that are not within the control of the individual. Jurisdictional Statement at 12a-13a. *See Mathews v. Lucas*, 427 U.S. 495, 505 (1976). For certain types of disabling mental illness, "[r]ecovery from

[28] The functional difference between review under a strict scrutiny test and under a heightened scrutiny test also supports application of heightened scrutiny to classifications disadvantaging the mentally ill. Certain legislative classifications (along lines of *e.g.*, race, religion, national origin) are subject to strict judicial scrutiny because there is a constitutional presumption that such distinctions are irrelevant for virtually all purposes of government. Thus, the existence of such classification is itself normally suspect. Other types of classifications (along lines of *e.g.*, legitimacy of birth or alienage) are not *per se* suspect in the sense of the classifications being inherently invalid legislative functions. To some extent such statuses are in fact necessary creations of legal classification. But because of the factors of political powerlessness, stigma and insularity affecting some groups, the presumptive validity of classifications affecting those groups is eroded, and the particular classification is scrutinized more closely than it otherwise would be.

mental illness is, for the most part, beyond voluntary control." 1 J. ZUSMAN & W. CARNAHAN, MENTAL HEALTH: NEW YORK LAW & PRACTICE 11-9 (1976).[29]

The Secretary's overbroad assumption regarding the inability of mentally disabled persons to contribute to society is itself based on "stereotyped characteristics not truly indicative of their abilities." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).[30] Mental illness sometimes affects an individual's ability to participate in society, although the relationship is far more attenuated than the Secretary suggests. Assumptions like the Secretary's become self-fulfilling prophecies in that the handicaps of the mentally ill are in significant part attributable to public attitudes of rejection and avoidance. *Public Attitudes, supra*, at 10.

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[29] Moreover, there is an increasing and now substantial body of medical evidence that genetic or biochemical factors play a significant role in causing or creating a predisposition to many types of mental disorders, including schizophrenia and affective disorders (depressions and manias). THE HARVARD GUIDE TO MODERN PSYCHIATRY 81-91, 94-101, 270-71, 301-303 (A. Nicholi ed. 1978); I-II COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 99-101, 162-64, 181-84, 856, 868-72, 882-87, 983-84, 1014-15, 1160-66 (2d ed. A. Freedman, H. Kaplan & B. Sadock eds. 1975); E. SLATER & V. COWIE, THE GENETICS OF MENTAL DISORDERS 11-91 (1971).

[30] Many forms of mental illness have a highly specific impact on their victims, leaving their decisionmaking capacity and reasoning ability largely unimpaired. *Developments—Civil Commitment, supra*, at 1214. *See also id.*, at n.80, 1350 n.146. Mental illness—even when it requires hospitalization—is a concept wholly distinct from incompetence. Public attitudes and laws which automatically equate the two are incorrect. *See* BRAKEL & ROCK, *supra*, at 250-55, 257-58, 264; *Winters v. Miller*, 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971). Moreover, "[t]he enormous disability associated with mental

(Footnote continued on following page)

Finally, the Secretary's reliance on the asserted inability of the mentally disabled to participate equally in society as the basis for denying them any special judicial protection is particularly ironic in this case. The SSI program is specifically intended to mitigate the results of disability, which may prevent the mentally disabled from participating equally. 42 U.S.C. §§ 1381, 1382d (1976 & Supp. II 1978). Measured against this purpose, the Secretary's contention that the mentally ill appellees in this case should receive no special judicial protection precisely because of their disability is simply perverse. This is particularly so since the practical effect of the challenged statutory exclusion may be to prolong or intensify the very disability triggering SSI eligibility.

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[30] *continued*
illness is to a large extent superimposed . . . by the rejection mechanisms stemming from cultural attitudes." ACTION FOR MENTAL HEALTH, *supra*, at 48-49. Disability results or is exacerbated because victims of stigma frequently accept the stigmatized versions of their identities. *See* E. GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 9 (1963); *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

Some classifications based on mental illness are valid, and when mentally ill people are incompetent the legislature may classify for many purposes on the basis of this criterion. The reference in our Motion to Affirm at 25, to "carefully honed exclusion[s] in some contexts (*e.g.*, voting) . . . " was meant to make this point, and not the one that the Secretary appears to read into it—that general discrimination against or disenfranchisement of all the mentally ill is properly based on improper stereotypes regarding their asserted "inability" to contribute to society. Secretary's Brief at 25. Thus, a state presumably may deny the franchise to those who are mentally ill and incompetent as a result thereof. This does not, however, justify a sweeping, stigma-based disenfranchisement of or other discrimination against all persons identified as mentally ill or disabled. *See* Klein & Grossman, *Voting Competence and Mental Illness*, 127 AM. J. PSYCH. 1562 (1971).

The statutory exclusion of appellees discriminates against a class of persons that has no political power and that is "characterized by some unpopular trait" resulting in a "special likelihood of bias on the part of the ruling majority." *New York City Transit Authority v. Beazer*, 440 U.S. 568, 593 (1979). In such circumstances any discriminatory legislation must be "carefully tuned to alternative considerations," *Trimble v. Gordon*, 430 U.S. 752, 772 (1977), or otherwise substantially related to an important governmental interest. *Wengler v. Druggists Mutual Insurance Co.*, 100 S.Ct. 1540, 1545 (1980). The exclusion of appellees is not.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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October, 1980.

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